STATE OF MICHIGAN
in the
MICHIGAN SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter, Walter Mackey, Barbara Mackey, Gary Gibson, Ellen Gibson, Ted Jungkuntz, Loise Jungkuntz, David Sponseller, Mary Sponseller, Mike Gladieux, Martha Gladieux, Helen Rysse, and Terry Trombley, John and Therese Williams,

Plaintiffs, Appellants

v.

Ann Arbor Public Schools a/k/a The Public Schools of the City of Ann Arbor, Board of Education, Ann Arbor Public Schools, Karen Cross, in her official capacity as President of the Board of Education for Ann Arbor Public Schools; and Glenn Nelson, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools.

Defendants, Appellees

and

Ann Arbor Education Association, MEA/NEA

Intervening Defendant, Appellee

Supreme Court No. 128768

Court of Appeals No. 253565
Washtenaw County
Circuit Court No. 03-1046-CZ

Applicants' Supplemental Brief.

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Suppl

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APPLICANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

This Supreme Court should use its peremptory power to resolve the issue of public importance presented by Rohde's Application For Leave To Appeal, i.e., whether Michigan's Marriage Amendment and state laws governing marriage prohibit the recognition of same-sex marriages by another name, (i.e., "domestic partnerships") for the purpose of providing benefits to "domestic partners." The strained and tendentious interpretations of MCL §129.61 advanced by the Defendants provide no good reason to avoid the merits of Rhode's Application. And the merits of Rohde's Application make plain that peremptory relief is fully justified. This Court should exercise its peremptory authority to enter a final decision and judgment granting Rohde the relief she has requested. MCR 7.302(G)(1); MCR 7.316(A)(7).

The reasons this Supreme Court should take peremptory action are simple and compelling. For one thing, Rhode satisfied both the letter and spirit of MCL §129.61, the statute which authorizes her suit, when she informed Defendants that their use of public funds to provide "domestic partnership" benefits program violated the state law governing marriage and asked them to halt that use of public funds. For this simple reason, the self-serving and unreasonable interpretations of MCL §129.61 offered by the Defendants should be rejected.

But there is another, more compelling, reason for peremptory action: this Supreme Court should play no part in charades. Behind the Defendants' protestations about deprivation of the notice they needed to sue themselves–to invalidate a policy they drafted, enacted, and currently administer–are the facts which give the lie to the assertion: the Defendants have known about Rohde's claim since September 22, 2003, and they have defended the policy she believes unlawful throughout this litigation.

Rohde respectfully submits that this Supreme Court should use its peremptory authority to promote the "just, speedy, and economical determination" of this action. MCR 1.105 This Court should find that Rohde's notice satisfies both the letter and spirit of MCL §129.61, and enter judgment awarding Rohde the relief she has requested. See, e.g., MCR 7.302(G)(1); MCR 7.316(A)(7).

I. The Applicants Have Standing To Challenge AAPS' "Domestic Partnership" Benefits Policy Under The Plain Language Of MCL §129.61.

In this case, Rohde brought her claims pursuant to MCL §129.61. By its terms, MCL §129.61 provides that a taxpayer:

> may institute suits...at law or equity on behalf of or for the benefit of the treasurer of such political subdivisions, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto....

MCL §129.61. The record demonstrates that Rohde directed letters to the following public officials: (1) the Governor of the State of Michigan; (2) Legal Counsel for the Executive Office of the State of Michigan; (3) the Attorney General of the State of Michigan; (4) the Superintendent for the Department of Education for the State of Michigan; (5) the Assistant Superintendent for the Department of Education; (6) the Washtenaw County Prosecutor; (7) nine

members of the Ann Arbor Schools School Board; and (8) The Superintendent for Ann Arbor Public Schools.[1] As noted by the Court of Appeals, Rohde's letters read as follows:

> I [or We] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or We] ask that you halt this illegal use of public funds at your earliest convenience.

Opn. At 4. The letters were sent by certified mail on or about December 15, 2000 and received at or around that time. When no action was taken to halt the illegal expenditure of public funds to recognize and subsidize same-sex "domestic partnerships" Rohde filed the suit authorized by MCL §129.61–on September 22, 2003.

In the opinion which Rohde seeks leave to appeal the Court of Appeals affirmed the dismissal of Rohde's claim on the grounds that Rohde had failed to satisfy the statutory requirements for standing under MCL §129.61. The Court of Appeals gave three related reasons for its decision. First, Rohde had used the word "request" not "demand" in the letter she directed to members of AAPS' school board (and other public officials). Opinion at 4. Second, Rohde had requested that the public officials halt the illegal expenditure rather than making a demand for "legal action" (to halt the illegal expenditure). *Id.* Third, Rohde had not directed her request to the treasurer of the AAPS school board, the public officer the Court of Appeals found "likely responsible for maintaining such a lawsuit." *Id.*

The Court of Appeals interpretation of MCL §129.61 is error as a matter of law. It is

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[1]The letters sent by Rohde along with the certified mail receipts are part of the record but attached hereto for ease of reference.

fundamental that, "when construing a statute, this Court must consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute." *See Shenkman v. Bragman*, 261 Mich. App. 412, 682 N.W. 2d 516, 517 (2004). The appellate court's interpretation of MCL §129.61 violates this cardinal principle in several related ways.

A. Rohde's "Request" Is A "Demand" Within The Meaning Of MCL §129.61.

The Court of Appeals erred when it held that Rohde's "request" did not satisfy the "demand" requirement of MCL §129.61, a conclusion which defies the plain language of the statute, its own reasoning, and common sense. In its opinion, the Court of Appeals observed that terms used in a statute must be given their plain meaning and noted that the dictionary definition of "demand" is "to ask for with proper authority." Opinion at 4. Of course, this is precisely what Rohde did: she requested (i.e. asked), AAPS to halt its unlawful expenditure based upon MCL § 129.61. Simply put, Rohde's "request" is a "demand" according to the plain meaning of "demand." *See Cain v. Waste Management*, 427 Mich 236, 259 (2005)(noting that when determining plain meeting it is appropriate to consult a dictionary.)

Requiring taxpayers to use the less civil term "demand" elevates a pointless exercise in semantics above the well settled principle that "when construing a statute, this Court must consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute." *See Shenkman*, 261 Mich. App. at 414, 682 N.W. 2d at 517. Common sense indicates that a (civil) request is more likely to secure the desired result–the halting of an unlawful expenditure–than a more provocative demand. Put another way, common sense indicates that the appellate court's construction of the statutory term is not a reasonable construction, i.e., one designed to actually advance the object of the statute: to halt unlawful

expenditures. The purpose of the demand is to determine if public officials will halt the unlawful expenditure and thereby obviate the need for a taxpayer suit–it is not to engender litigation. Rohde's "request" was well calculated to serve that statutory purpose, a "demand" is less so. The Court of Appeals' engaged in counter-productive hairsplitting when it held that Rohde's "request" was not a "demand" within the meaning of MCL §129.61. *See Cain v. Waste Management*, 427 Mich 236, 259 (2005)(noting "we read the words in a statute together, to harmonize the meaning of the clauses, and give effect to the whole."); *see also Breighner v. MHSAA*, 471 Mich 217, 232 (2004)(statutory terms cannot be viewed in isolation but must be construed in light of statutory scheme);

B. MCL §129.61 Does Not Require A Demand For Litigation.

The Court of Appeals also erred when it held that Rohde's demand that the public officials "halt the unlawful expenditure" was insufficient because the statute requires her to "demand legal action." See Opn. at 4. As an initial matter it is utterly unclear why Rohde's request that public officials "investigate and halt the use of public funds to provide so-called 'domestic partnership' benefits to employees of [AAPS]" fails to pass muster as a demand for legal action. Plainly Rohde did not contemplate that public officials would take "illegal action." Plainly Rohde did not rule-out a lawsuit when she asked public officials to halt the unlawful expenditure. Rohde requested that the public officials halt the unlawful expenditure–she did not (and could not) try to dictate the course of action these officers might use, in their discretion, to achieve the public good the statute aims to secure.

To the extent the Court of Appeals held that MCL §129.61 requires Rhode to demand a lawsuit (as opposed to a halting of the illegal expenditure), its interpretation is supported by

neither the statutory terms nor common sense. Despite the appellate court's apparent confusion, the purpose of the statute is to halt the unlawful expenditure–not "demand a legal action" as the Court of Appeals would have it. Opinion at 4. Thus the demand requirement is designed to further the statutory purpose, i.e., give the public officials an opportunity *to halt the illegal expenditure*, not impose a duty to embark upon litigation (no matter how needless). Indeed, it is both wholly unnecessary and absurd to construe MCL §129.61 so as to require a public officer or body to bring suit to remedy an unlawful expenditure that may be stopped by other means. Such an absurd construction fails to "consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute." *See Shenkman, supra.*

Further, the statutory language provides no support for–indeed cuts against–this absurd construction. The statute provides that prior to a taxpayer suit, "a demand shall be made on the public officer, board or commission whose duty it may be to maintain suit followed by a neglect or refusal to take action in relation thereto...." MCL §129.61 (emphasis supplied). Thus, by its terms the statute requires that the demand be made on the public official etc. whose duty it "may be" to maintain a suit, recognizing the duty will depend upon the circumstances, including whether the matter can be resolved without need of litigation. Relatedly, the statutory trigger does not turn solely on whether a public officer files suit but, instead, it turns on whether the officer has failed to take action "in relation thereto," recognizing that steps taken in relation to the demand, including steps which halt the unlawful expenditure, would negate the need for a lawsuit altogether. Thus the statutory language supports the commonsense notion that the purpose of the statute is to halt the illegal expenditure and, therefore, it does not require a demand for a lawsuit (as opposed to remedial action). Put another way, the Court of Appeals'

interpretation of MCL §129.61 is wrong because it mistakes a means (a law suit if necessary) for the end that the statute seeks to serve, i.e., the proper use of public funds (not litigation by public officials). *See Cain v. Waste Management*, 427 Mich 236, 259 (2005)("we read the words in a statute together, to harmonize the meaning of the clauses, and give effect to the whole.")

C. MCL §129.61 Does Not Require A Demand On The Treasurer.

The Court of Appeals' erred when it held that Rohde failed to satisfy MCL §129.61 because she did not address a demand to the treasurer of the AAPS' board, a holding that defies the plain language of the statute and common sense . Opinion at 4. For one thing, the statute expressly authorizes a demand upon the "public officer, board or commission whose duty it may be to maintain such a suit...." See MCL §129.61. Given that the statute authorizes a demand to the "board" it provides no support for the view that Rohde must address her demand to the treasurer.

In fact, the Court of Appeals' construction of MCL §129.61, requiring the demand to be addressed to the treasurer on the theory that the treasurer is "the officer likely responsible for maintaining such a suit," is at odds with the statutory language. While recognizing the taxpayer suit is "on behalf or for the benefit of the treasurer," the statute does not require the demand be made on the treasurer; the statute requires the demand be made on the public officer, board or commission" whose duty it may be to maintain a suit (on behalf or for the benefit of the treasurer). The statutory distinction between the treasurer and other public officers etc., defies the Court of Appeals' notion that the demand should be addressed to the treasurer. Indeed, if the statute took the view advanced by the Court of Appeals, then it would require the demand to be

made on the treasurer. The statute does not do so, and the Court of Appeals erred when it glossed this limitation on the statute.

Moreover, it makes no sense to construe MCL §129.61 so as to require the taxpayer to demand that the treasurer sue the AAPS board and, based on that construction, require a demand on the treasurer (as opposed to the board). Indeed, the Court of Appeals recognized as much when it rejected AAPS' argument that Rohde did not have standing because the treasurer was not a party in this action. See Opinion at 3 ("it would violate common sense to interpret MCL §129.61 in such a way that would permit a treasurer's refusal to take action to prevent taxpayers from suing....Such an interpretation would enable corrupt treasurers to block the recovery of such funds and to permit the misappropriation to continue.").

Finally, the limitation imposed by the Court of Appeals' construction of the statute is completely arbitrary and has no meaningful relation to the facts of record. Those facts of record demonstrate that Rohde directed her demand to seventeen (17) public officers (including the nine members of the AAPS school board) "whose duty it may be" to halt the illegal expenditure. Neither the Court of Appeals, AAPS, nor the AAEA, provide any basis in the statutory language for the view that the treasurer is the only officer who is the appropriate recipient of the statutory demand. The reason is simple: the statutory language does not support this arbitrary limitation but allows the demand on the "public officer, board or commission, whose duty it may be to maintain a suit..." See MCL 129.61. Missing from the Court of Appeals' argument is any reason why the treasurer (who implements the spending priorities of the board), is the sole and exclusive "public officer whose duty it may be" to take action regarding a demand. As there is absolutely no basis in the statutory language (or reason) to think that the officials to whom Rhode directed

her demand (including the AAPS board members), did not have a duty to halt the illegal expenditure, there is no reason to find that Rohde failed to satisfy MCL §129.61 when she requested that they do so. For these reasons, the Court of Appeals erred as a matter of law when it held that Rohde did not satisfy MCL §129.61 because she did not address her demand to the treasurer of the AAPS school board although she had directed her request to the members of the board itself.

II. AAPS' Alternative Arguments Fail As A Matter Of Law.

AAPS provides no valid ground to affirm the Court of Appeals. AAPS' assertion that Rohde did not meet the requirements of MCL §129.61 because the letters were not attached to the Complaint is humorous given the slavish literalism it advocates elsewhere: after all the statute does not require Rhode to attach the letters or, for that matter, cite the statute. See Resp. at 15 n. 5, 16. And AAPS never explains why Rohde's request that they halt the illegal expenditure of public funds to provide "domestic partnership" benefits is somehow defeated by her request that AAPS investigate the scope of expenditures–or how the statute supports this argument. See Resp. at 15-16.

AAPS's claim that Rohde lacks standing because she did not file security for costs is insupportable. See Resp at 4. The statute does not specify the amount of–or time for–the deposit. This is why Rohde requested that the Circuit Court determine the amount so she could file security in her Complaint. See Amended Complaint at Wherefore ¶2. The Court dismissed the case without granting that request, which is why it cannot provide any basis for affirmance. The statutory language makes the reasonable interpretation and application of the statute by the Circuit Court indispensable for this requirement. Rohde's suit cannot be dismissed because the

Court did not grant her request for a decision as to what would satisfy the statute and doubtless this is why the Circuit Court did not use the security requirement as a basis for dismissal (it neglected no others).

AAPS' effort to defeat standing on the theory that board membership changed or "demand implies urgency," see Resp. at n. 6, has no basis in the statute or reason. It takes real gall to suggest that a public body can disregard the statutory demand on the grounds that individual members came and went. It would be just as galling to negate Rohde's demand simply because she gave the board a reasonable time to drop the unlawful expenditure when collective bargaining agreements were renegotiated for, as AAPS well knows, it extends same-sex domestic partnership benefits in collective bargaining agreements, see Resp. at n. 1, and Rohde took it for granted that by any reasonable interpretation of the statute, she would have to allow time for renegotiation of contracts (not breach of contract). AAPS implicitly concedes as much when it tries to manufacture an objection based on the *ex post facto* clause. See Resp. at 32. The AAEA's argument to the same effect should be rejected for the same reason.

Finally, AAPS' claim that Rohde does not have standing under the statute because she cannot show a legally protected interest, see Resp. at n. 7, cannot carry the day for AAPS. It is merely tautological (and wrong) to the extent it turns on AAPS' assertion that Rohde did not satisfy the statutory requirements or that AAPS' use of public funds is not unlawful. Its wholly mistaken to the extent it claims that the statutory standing does not satisfy constitutional standing for, as the case cited by AAPS notes, statutory standing satisfies the constitutional requirement given the unlawful expenditure at issue. *See Nat. Wildlife Fed. v. Cleveland Cliffs*, 471 Mich. 608, 613 n.4 (2004). This is obvious if only because AAPS' approach, if accepted, would

eviscerate statutory standing.

III. The AAEA's Alternative Arguments Fail As A Matter Of Law.

The arguments AAEA would use to rob Rohde of standing also contradict the statutory language and defy common sense and logic. The Court of Appeals has already rejected the AAEA's argument that Rhode's action "on behalf of the treasurer" is not authorized by MCL §129.61. because the treasurer is not plaintiff. As the Court of Appeals noted, the argument finds no support in the language of the statute or logic–and it would lead to pernicious consequences. See Opn at 1-3. Here, as with the run of arguments advanced by the Defendants, AAEA rips the statutory language loose from its moorings, the purpose disclosed by the language considered as a whole. " *Cf. Cain v. Waste Management*, 427 Mich 236, 259 (2005)(noting that when determining plain meeting it is appropriate to consult a dictionary.)

It is no surprise that absurd results follow from such an absurd approach to the matter at hand.

In any event, the facts of record demonstrate that the Court of Appeals was quite correct on this point. AAEA notes that the Treasurer of AAPS is a board member and a defendant. See AAEA Response at "C." As such the Treasurer has defended the legitimacy of the "domestic partnership" benefits policy at every stage in this litigation. The AAEA's argument would, if accepted, allow the treasurer to thwart the taxpayer suit authorized by MCL §129.61. Thus the facts of the case demonstrate that the AAEA's argument must be rejected.

The AEA's effort to deny notice of the demand based upon changing membership of the board has no support in the statute and lacks candor. AAEA at 14-15. The implicit notion that the statute requires a citizen to repeatedly serve notice to a public body based upon changes in composition is utterly ridiculous and would, if adopted, constitute an unreasonable interpretation

of the statute.

Truth be told, AAEA's effort to defeat Rohde's request now–as if it would have proceeded differently–is disingenuous in the extreme. The truth of the matter is that the AAEA "moved to intervene...to protect the interests of its members, both present and future, as well as the integrity of the existing collective bargaining agreement." AAEA at 8. And AAPS' failure to take action in response to Rohde's request–and the position it has taken on the expenditure in connection with this litigation–indicates that it intends to follow its same-sex domestic partnership policy (and provide domestic partnership benefits) unless restrained from doing so. It is clear that this case is not moot, which simply shows that the notice, three days before the suit, three months, or three years, served the statutory purpose–to give the public body an opportunity to halt the unlawful expenditure. Again, it is odd that the AAEA (and AAPS) would have the statute require less notice, not more, before public bodies are sued.

CONCLUSION

This Court must not allowed itself to be drawn into a charade but should use its peremptory power to promote the "just, speedy, and economical determination" of this action. MCR 1.105. This Court should find that Rohde's notice satisfies both the letter and spirit of MCL §129.61, reach the merits of Rohde's Application, and enter judgment awarding Rohde the relief she has requested. See MCR 7.302(G)(1); MCR 7.316(A)(7).

Respectfully submitted,

May 25, 2006.

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